United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7352

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7352

BP/S

Le ROY F. GILLEAD, et al,
Plaintiffs-Appellants,

-V-

DEFENSE SUPPLY AGENCY, et al,
Defendants-Appellees.

REPLY FOR APPELLANTS

On Appeal From The United States
District Court For The Southern
District Of New York

Le ROY F. GILLEAD
Appellant pro se, et el
1236 Burke Avenue
The Bronx, New York 10469

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APPELLEES STATEMENT OF THE CASE AS SEEN BY APPELLANTS

1. The thrust and effect of appellees argument is that even if the defendants-appellees, federal agency and their officials and supervisors, jointly and severally, are without authority, unlawful and against public interest, etc., to interpret 41 CFR 60-2.2(b) inconsistent with the spirit and intent of Executive Order 11246, as amended (hereafter the Order), and 41 CFR 60-2 and are not cooperating under the Order as required to enforce 41 CFR 60-2.2(b) and (c) by the issuance of memorandum unlawfully directing plaintiff-appellant career federal employee Equal Opportunity Specialist (EOS) and his fourteen (14) EOS colleagues against lawful enforcement of 41 CFR 60-2.2(b) to protect the equal employment opportunity (EEO) rights of the beneficiaries under the Order, that thereafter, on the basis of the unlawful memorandum, defendants, on its merits* could construct, among other wilful and malicious wrongs, adverse rating and evaluations against plaintiff because, according to defendants, plaintiff was the only EOS of the fifteen (15) who failed to follow defendants' unlawfull memorandum and on these facts together with

* Defendants Memorandum of Law on Motion to Dismiss, p. 5, asterisk.

defendants adverse final determinations in plaintiff"s seven (7) grievances, thereby causing his constructive termination, make plaintiff's statutory right of review moot since defendants on the merits are immune from the allegations of abuse of discretion, impropriety, against public interest, etc., (see para. 8, Point I below) and review now for restitution to clear and correct plaintiff's permanent federal employee career record is of no moment as he is not with the agency and it does not affect defendants.

2. Further, although plaintiff and his colleagues are federal employees certified in the public interest to lawfully protect the class of beneficiaries under the Order by enforcing 41 CFR 60-2.2(b), it is defendants discretion to be inconsistent with the Office of Federal Contract Compliance (OFCC) rules, regulations, rulings, interpretations and to be unlawful in directing plaintiff and his colleagues to not protect, in the public interest, the class of beneficiaries under the Order, that is by having plaintiff and his colleagues, not conducting preaward reviews and after preaward reviews, recommend for the award of contracts in the amount of a million dollars or more, contractors who are not in compliance with their equal opportunity clause obligations and the applicable rules and regulations of OFCC, e.g., 41 CFR 60-2.2(b).

3. Additionally, on the merit of defendants' unlawful conduct, it is now moot for plaintiff to come before this Court to continue to timely protect his on-going permanent federal employee career record, employment rights for himself or his colleagues or in the public interest to assert protection for the EEO rights of the beneficiaries under the Order, even though plaintiff is still an EOS in another Agency engaged in protecting the EEO rights of the beneficiaries under the Order.

4. As of this reply, as can be substantiated by plaintiff's remaining former colleagues, defendants continue to evade review of their repetitive unlawfulness under 41 CFR 60-1.44, 41 CFR 60-2.2(b) and (c), in the conduction of compliance

and preaward ($1 000 000 or more) reviews. Yet, in support of its argument defendants avers mootness to dismiss the entire complaint against a federal employee EOS, GS- 13, continuing his federal career as a GS - 12 in another federal agency and inspite of plaintiff's statutory right of review under 5 USC 702 to protect his life, liberty and property. Defendants also avers that while plaintiff was certified by them to be qualified to fairly and adequately protect the EEO right of the beneficiaries under the Order he cannot do so now even though he is, now, more qualified.

AS TO APPELLEES POINT I ON MOOTNESS

5. Analysis of the relief sort in the Complaint, Para. 68, indicates that of the eveven (11) items, a thru k, five (5) items, i.e., b,e,f,j,k, relate specifically to explicit and/or implicit statutory or other r lief for aggreived federal employees under 5 USC 702, whether still employed by defendants or not. Of the remaining six (6) collateral items, i.e., a,c,d,g,h,i, for relief all are against defendants in different forms. While plaintiffs complaint is principally a statutory review to protect his permantent federal career record and collaterally to enjoin and restrain defendants, defendants aver the collateral relief as the principal relief sort, because it is inimical to their continued unlawful procedures, pattern and practices in implementing the EEO program against the Order.

6. Plaintiffs relief sort under the Complaint, para. 68 and Appellants Brief, para. 72, are comparable and doved tailed as follows:

Comp. Para. 68 -		a	b	c	d	e	f	g	h	i	j	k
Brief Para. 72 -	a	b	c	d	e	g h	f	e	j k	e	e	e	j	i j

7. As stated in Appellants Brief, p.3, Table of Authorities, under Cases, "There are no cases under the applicable statutes or facts for this appeal." Appellees eight (8) cases cited under Part I of their Brief, in no way relate to or are supportive of defendants contentions in fact or substance to the instance case. However, the five (5) cases to support defendants contention that, "This is not a case where the allegedly wrongful conduct is 'capable of repetion, yet evading review', a situation in which the Supreme Court has occasionally refused to invoke the bar of mootness where it might otherwise be applicable," is a factor which rests squarly with this case in that defendants unlawfulness, as of this reply, continues to evade review in the conduction of compliance and preaward reviews by defendant agency.

8. Examples of applicable distinctions which bar defendants point on mootness and separates on the facts and substantively in law and equity, defendants' conduct in this case from the line of cases cited for support by appellees, are as follows:

a. abuse of discretion
b. actions against public interest
c. arbitrariness
d. bad faith
e. capriciousness
f. criminality
g. impropriety
h. injury to employees rights
i. intentional wrong
j. interferance with federal employee lawful discharge to enforce the law
k. joint and several liability
l. lack of authority
m. lack of/equal protection of the laws due process and
n. lack of reasonabness
o. lack of rational reason for conduct
p. lack of sovereign immunity
q. maliciousness
r. not within scope of authority
s. precedent
t. recalcitrancy
u. unlawfulness
v. violation of obligations
w. violation of right of life, liberty and property
x. willfulness.

9. In terms of the ramification of this case, see Appellants' Appendix, p. 66, "Enforcement Action Taken", and in addition, A Report of the United States Commission on Civil Rights - July 1975, The Federal Civil Rights Enforcement - 1974,

Volume V, To Eliminate Employment Discrimination, Chapter 3 IV F, Enforcement Posture of the Compliance Agencies, pp. 295-299 (attached); OFCC Memorandum 4228-1, June 13, 1975, Outstanding Show Cause Notices (attached) and Legal Aid Society of Alameda County, et al (Calif.) v. Brennan, 381 F Supp. 125 (N D. Cal).

10. As to defendants statement in the Brief For Appellees, p. 5, that, "Present members of the appropriate classes are perfectly able, should they be so inclined, to bring actions challenging the Defense Supply Agency's administration of the equal opportunity program. See Henderson v. Defense Contract Administration Services Region, New York,(DCASR-NY), 370 F. Supp. 180 (S.D.N.Y.)." — this case is primarily on a complaint of racial discrimination against the Chief, Contracts Compliance Office (CCO), DCASR-NY, defendant No. 7 in this case, for retaliatory actions,with support from Henderson's other defendants, in assignments, career opportunities, etc., for an earlier complaint of discrimination against defendant No. 7 in this case when he was Deputy Chief. Collaterally, the issue of the Agency's administration of the Office and of the EEO contract compliance program are raised as in this case because they are inextricably entwined for a just decision. Further, even if the Henderson case were applicable, it is unlikely that those who followed the unlawful directions of defendants, under economic duress or otherwise, to their benefit, according to defendants in comparison with plaintiff, would challange defendants.

11. Clearly, appellees have failed to substantiate that dismissal of the entire complaint or part thereof for mootness was not in error.

AS TO APPELLEES POINT II ON THE CLASS ACTION PERFECTED ON AMENDED PLEADING

12. The class action like the collateral relief for orders against defendants is inseparable for the question on mootness as it relates to defendants unlawfulness against plaintiff, the class, public interest and permeates this case.

Therefore, the required declaratory judgment relief (Brief of Appellants, para. 72d) with no issues in dispute, would settle the matter for plaintiff, the class and the public interest with the necessary and needed precedent setting implications and ramifications to give efficacy for enforcement of the EEO program as required. See para. 9 above.

13. In the public interest defendants certified plaintiff as qualified to fairly and adequately protect the interests of the class in the role of quasi assistant attorney general and then, in violation of its obligations and trust in the public interest, unlawfully directed plaintiff not to protect the class. Consequently, defendants, with unclean hands are estopped by their bad faith from having the class action dismissed to prevent plaintiff, not an experienced lawyer, to continue to conduct this litigation for the simple and uncomplexed relief sort without trial, i.e., declaratory and summary judgments. See plaintiff's Affidavit in Opposition to Motion to Dismiss, para. 14; also, Brief of Appellants, para. 72 d, e.

14. It is to be noted that defendants unlawfulness not to protect the class of beneficiaries under the Order was general not specific, that is against, race, color, religion, sex and national origin. As a federal employee and citizen in the community adversely touched directly and indirectly by defendants' unlawfulness, I am a member generally of the class of beneficiaries under the Order and specifically of four (4) of the five (5) classes protected against federal contractors not in compliance with their obligations under the equal opportunity clause. Therefore, for plaintiff to still act in the role of quasi assistant attorney general to bring this class action is of greater weight than "The role of 'private attorneys general' /which/ is not uncommon in modern legislative programs." See plaintiff' affidavit in opposition to motion to dismiss, para. 24, 409 U.S. 211. Consequently, non-member plaintiff(s) can and have represented a class.

15. Here too, defendants-appellees have failed to substantiate that dismissal of the class action for lack of membership and qualifications to represent was not in error.

CONCLUSIONS FROM APPELLEES POINTS I AND II

16. Based on Appellants Brief, Appellees Brief* and Appellants Reply, the order of the District Court dismissing the entire complaint and the class action is in error and must be reversed.

October 25, 1975

Respectfully submitted,

Le Roy Gillead

Le ROY F. GILLEAD
Appellant Pro se, et al.

* Received by ordinary mail
October 11, 1975.

F. Enforcement Posture of the Compliance Agencies

Under the Executive orders and OFCC regulations, compliance agencies may impose three types of sanctions: (1) prohibiting the award of a contract to a bidder, (2) cancellation or termination of existing contracts or debarment from additional contracts, and (3) withholding of progress payments.[892]

If the preaward review, which is required of all bidders on contracts of $1 million or more,[893] reveals deficiencies in the company's employment practices, then the compliance agency must request the contracting agency to delay award of the contract until the bidder develops an affirmative action plan to correct the deficiencies.[894] From 1965 to 197[illegible], according to OMB, compliance agencies requested delay of contract awards in only 10 or 12 instances.[895] OFCC does not know how many such request have occurred since 1971,[896] or how many occurred during any fiscal year.[897]

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892. See Part II of this report supra.

893. 41 C.F.R. § 60-1.20(d)(1974).

894. 41 C.F.R. § 60-2.2(c)(1974).

895. OMB Budget Analysis, supra note 846.

896. Interview with Robert Hobson, Associate Director, Nonconstruction Operations, OFCC, Oct. 29, 1973.

897. Wooten interview (July 18, 1974), supra note 774. There is some evidence that agencies fail to comply with OFCC regulations requiring preaward reviews. In an investigation of 84 Federal contracts, each exceeding $1 million, GAO found that almost 30 percent had been awarded without a preaward review. 1975 GAO Report, supra note 726, at 35-6 and 49-50.

Once a contract has been awarded, the contractor may be selected for review if a complaint has been filed by one of its employees, if its employment records indicate that its workforce suffers from underutilization of women and minority workers,[898] or if the compliance agency wishes to conduct a followup review to verify that the contractor is abiding by the promises it made previously. When an agency finds that an affirmative action plan is not acceptable or that the contractor is not following its plan, the agency is required to issue a notice to the contractor, requiring it to show cause, within 30 days, why proceedings should not be instituted. During the 30-day period, the agency is required to negotiate with the contractor to resolve the deficiencies.[899]

The show cause notice, in effect, shifts the burden of proof to the contractor to show that it is in compliance. Since this notice is the preliminary step to sanction proceedings, OMB has determined that the issuance of show cause notices is a possible indicator of agencies' commitment to standards of strict enforcement.[900] OMB found that agencies tended to issue show cause notices to about 2 percent of the contractors reviewed in 1971.[901] In fiscal year 1972, this same rate was maintained.

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898. Agencies have been instructed by OFCC to investigate the employment practices of a selected number of their total contractor facilities; the means of selection is the Revised McKersie System, explained on pp. supra.

899. See Part II of this report supra.

900. OMB Budget Analysis, supra note 846.

901. Id.

Agencies conducted approximately 20,839 reviews and issued 404 show cause notices. In fiscal years 1973 and 1974, the issuance of show cause notices increased slightly. Out of 21,825 contractors reviewed in fiscal year 1973, 698 (or 3.2 percent) received show cause notices.[902] During fiscal year 1974, 3.6 percent of reviewed contractors received such a notice.[903] The agencies varied widely in the frequency with which they issued show cause notices.[904] For example, in fiscal year 1974, DOD issued such a notice to 16.7 percent of the contractors it reviewed, while three of the agencies issued no notices at all. There does not appear to be any relationship between the staffing or budget levels of the agencies and the frequency with they issue show cause notices.[905]

Although OFCC regulations require agencies to issue a show cause notice prior to negotiating with the contractor for corrections of violations, it appears that many agencies issue such notices only after protracted negotiations have broken down. AEC, for example, does not issue

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902. OFCC, Summary of Monthly Progress Reports, FY 1973; See Tables A, B, and C in Appendix for a listing of the number of show cause notices issued by each agency.

903. Out of 12,247 contractors reviewed, 444 (3.6 percent) received show cause notices. See Table C, Appendix. In its review of DOD and GSA compliance programs, GAO found that 48 percent of the show cause notices issued by DOD and 33 percent or more issued by GSA were in response to a contractor's failure to prepare or update a written affirmative action plan. 1975 GAO Report, supra note 726, at 26.

904. See Table D in the Appendix to this chapter.

905. On the hypothesis that more thorough reviews would both cost more and also be more likely to lead to a show cause issuance, this Commission compared the average cost per review, by agency, with the percentage of contractors issued a show cause notice. There did not appear to be a relationship between the approximate amount spent by each agency on a compliance review and the issuance of show cause notices. Id.

a show cause notice upon finding that a contractor has failed to develop an affirmative action plan,[906] although OFCC regulations clearly require such action.[907] GSA does not take any action other than negotiating upon finding that a contractor has failed to prepare a utilization analysis or goals and timetables. Only if the contractor repeatedly refuses to comply with the regulations does GSA issue a show cause notice.[908] HEW follows a similar practice,[909] as do the Departments of Commerce and the Treasury.[910]

If the contractor's response to the show cause notice is inadequate, the compliance agency is required to issue a notice of proposed debarment, allowing the contractor 14 days in which to request a hearing.[911] As of February 1975, only nine companies had been debarred in the 10 years since the Executive Order was issued. The first contractor was debarred in 1971, 2 days after the introduction of legislation proposing to remove OFCC's authority.[912] Six of the nine debarred companies were small specialty construction contractors. The first nonconstruction contractor, which was

906. Deposition of Armin Behr, Assistant Director, Contract Compliance, AEC, Dec. 2, 1974, in Legal Aid Society of Alameda County v. Brennan, supra note 830. According to Mr. Behr, a show cause notice is issued only after initial conciliation fails.

907. 41 C.F.R. 60-2.2(c)(1974).

908. Deposition of Betty A Mulholland, Assistant Director, Contract Compliance, Region IX, GSA 70-71, Sept. 27, 1973, in Legal Aid Society of Alameda County v. Brennan, supra note 830.

909. U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity 275-305 (January 1975).

910. GAO Report, supra note 830. See also 1975 GAO Report, supra note 726, at 27-9.

911. 41 C.F.R. § 60-2.2(c)(1974).

912. Legislative History, supra note 847, at 439.

debarred in August 1974, was also a small employer.[913] Three of the nine companies had been reinstated as of February 1975.[914] No notices of proposed debarment were issued during fiscal year 1974 and only two had been issued during the first half of fiscal year 1975.[915] The withholding of progress payments was authorized in April 1973, but as of February 1975 this sanction had never been used.[916]

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913. The companies and dates of debarment were as follows: Edgely Air Products, Levittown, Pa. (Sept. 17, 1971); Randeb, Inc., Newton Square, Pa. (Mar. 7, 1972); Russell Associates, Philadelphia, Pa. (Aug. 29, 1972); McNikol-Martin Co., Clarksburg, W. Va. (Mar. 1973); Harry Myhre, Harrisburg, Pa. (March 27, 1974); Dial Electric Co., Denver, Col. (Nov. 10, 1973). Memorandum to Heads of Agencies from Philip J. Davis, Acting Director, OFCC, Mar. 23, 1973. Telephone interview with Philip J. Davis, Director, OFCC, Jan. 8, 1974; Wooten interview (July 18, 1974), supra note 774; Sims and Reed interview (July 19, 1974), supra note 798. A nonconstruction contractor, Hesse Envelope Company of Dallas, Texas, was debarred on Aug. 8, 1974. Memorandum to Heads of Agencies, from Philip J. Davis, Director, OFCC, Aug. 8, 1974. In October 1974, two additional nonconstruction contractors were debarred, Blue Bell, Inc., a clothing manufacturer in Greensboro, N.C.; and Dibert, Bancroft, and Ross, a metal working company in Amite, La. Department of Labor News Release No. 74-644 (Nov. 25, 1974).

914. Edgely Air Products and Russell Associates were reinstated on March 23, 1973; Dial Electric was reinstated on May 16, 1974. Sims and Reed interview (July 19, 1974), supra note 798, and telephone interview with Doris Wooten, Special Assistant to the Director, OFCC, Feb. 26, 1975.

915. Wooten interviews (July 18, 1974), supra note 774, and (Feb. 26, 1975) supra note 914.

916. Wooten interview (Feb. 26, 1975), supra note 914.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance
WASHINGTON, D.C. 20210

JUN 13 1975

In Reply Refer To: 4228-1

MEMORANDUM TO: Heads of All Agencies

SUBJECT: Outstanding Show Cause Notices

FROM: PHILIP J. DAVIS
Director

It has come to the attention of the Office of Federal Contract Compliance that a very large proportion of the 30 day Show Cause Notices (SCN's) being issued by the Agencies are not being resolved within 30 days. SCN's remain outstanding, on the average, for as much as 88 days in some agencies.

This situation is, of course, intolerable and contrary to our regulations. Part 60-2.2(c) provides that upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under the Executive Order should not be instituted. Subpart (c)(1) of the same part further provides that if the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director of OFCC, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to S60-1.26(b) of this Chapter, giving the contractor 14 days to request a hearing. If a request for a hearing is not received within 14 days from such notice, the contractor must be declared ineligible for future contracts and current contracts must be terminated for default. There are no options available under these regulations.

Under Revised Order 14, Part 60-60.7(a) the compliance agency must have either found the contractor in compliance or must have issued a show cause notice within 60 days of receiving the contractor's AAP and support data. If a show cause notice is issued, the matter must be resolved within 30 days or a 14 day notice of intent to debar, terminate and/or cancel must be issued. If the contractor does not respond with a request for hearing within 14 days, the contractor must be declared ineligible for future contracts and current contracts must be terminated for default. Any deviation from this time schedule must be approved in advance by the Director of OFCC. At any point the contractor may, of course, avail himself of the hearing procedures set out in the regulations (41 CFR Parts 60-1.26 and 60-2.2).

Paul J. Curran

10/28/75